court approval on notice to stockholders, in view of the unresolved claims pending against them in this action. For, if petitioner is successful in this action, these Respondents will be required to account to Curtis for all damages sustained by Curtis as a result of the claims asserted in the complaint. Settling or otherwise disposing of the Culligan, Kantor and Blair claims by payments to them, with or without the exchange of general releases, would in effect result in whole or in part in a settlement of the claims asserted in this action.

The motion was argued below on December 10th and denied. The order was entered on December 16, 1964. From that order, the appeal was promptly taken.

On December 28, 1964, Curtis, Blair and Kantor issued a joint announcement reporting the "out-of-court settlement of their differences". It was stated "releases have been exchanged" (New York Times, January 1, 1965). The terms of the settlement were not disclosed. But in a proxy statement dated March 16, 1965 and submitted to the shareholders for the annual meeting of stockholders to be held on April 21, 1965, the following statements appear in connection with the settlement of claims effected by Curtis with Kantor and Blair, which settlement were sought to be enjoined below (proxy statement, p. 9):

> "Mr. Kantor and Mr. Blair left the employ of the Company on October 30, 1964 and resigned as directors on December 28, 1964. Subsequent to termination of their employment on October 30, 1964, Mr. Blair and Mr. Kantor commenced suit against the Company by Summons. Through their attorney, they claimed that they had been wrongfully discharged and alleged that under their employment contracts with the Company they were entitled to receive accrued deferred compensation aggregating $46,250 and sums in respect of unearned compensation for the balance of the terms of their contracts aggregating approximately $500,000. A settlement

> of the suit was effective December 28, 1964 pursuant to which each was to receive $75,000, $10,000 payable in 1964 and $65,000 payable in 1965. Mr. Blair also received $3,600 as reimbursement for business expenses incurred by him. Under the Settlement Agreement Mr. Blair and Mr. Kantor have agreed not to take voluntarily any action directly or indirectly injurious to the Company for a period of two years."

It appeared further from the proxy statement (at p. 11) that the 17,500 stock options in favor of Blair and the 30,000 stock options in favor of Kantor were terminated "by reason of termination of employment or by agreement with the employees" (*id*).

In connection with the termination of its employment agreement with Culligan, Curtis disclosed in the same proxy statement (at p. 7) that it took actions in settlement of Culligan's employment contract claims. Culligan vacated all his executive positions, resigned as a director and ceased all his executive and management activities for which compensation was provided in his employment contract which is the subject, in part, of this action. The proxy statement stated (*id.*):

> "The Company has an employment contract with Mr. Culligan which has been terminated effective January 16, 1966 (the Termination Date). Mr. Culligan will receive compensation through the Termination Date and for one year thereafter at the rate of $110,000 a year. Until the Termination Date Mr. Culligan will continue to perform certain services for the Company on special projects, including development of broadcasting opportunities for the Company. Under the contract, rights to deferred compensation will then have accrued to Mr. Culligan and he will be entitled to receive $22,093 a year for 10 years commencing with the Termination Date. Deferred compensation accrued during 1964 amounted to $50,484. The Company has agreed to and is maintaining $280,000 of insurance on Mr.

Culligan's life containing or subject to the following provisions: (1) Company ownership of the policies, (2) premiums payable by the Company and Mr. Culligan on a split-dollar basis, (3) designation of the beneficiaries by Mr. Culligan, with the Company to receive from the proceeds provided by a Fifth Dividend Option an amount equal to the cash value of the policies, and (4) a right in Mr. Culligan to purchase the policies for their cash surrender value upon leaving the Company's employ. During 1964 premiums on the policies amounted to $8,980, which were initially paid in full by the Company. Mr. Culligan repaid the Company $1,973 during 1964 being his share of that year's premiums. These policies are in addition to $240,000 of coverage provided to Mr. Culligan under the Company's Group Life Insurance Policy, described below at p. 13 and together therewith provide in excess of the $500,000 face amount of life insurance required by Mr. Culligan's employment contract. Mr. Culligan's contract also provides for the issuance of options for 50,000 shares of Common Stock of the Company. These options were issued to Mr. Culligan in 1962 at an option price of $6.8875 per share (95% of the fair market value on the date of grant). The options are now exercisable as to 60% of the shares covered thereby. On January 1, 1966, the options will become exercisable as to 80% of the shares covered thereby. Mr. Culligan's options will terminate 90 days after termination of his employment on January 16, 1966. None of these options has been exercised. Mr. Culligan holds additional options for 20,000 shares of Common Stock under the Company's Restricted Stock Option Incentive Plan."

Culligan will thus receive additional compensation of $220,000 for an additional two years, plus $220,000 in deferred compensation for an additional ten years. He will also have the benefit of $500,000 face amount of life insurance which is substantially paid for by Curtis. Before April 16, 1966 he may exercise options for 50,000 shares of Curtis stock. The option price is $6.8875 per share. The

closing market price on the New York Stock Exchange on February 26, 1965 was $10.50 per share (proxy statement, p. 10).

We have already argued in our petition that the historic thrust of Rule 23(c) is to bar settlements of claims, whether the settlement is effected by the stockholder plaintiff with the malefactors, or is accomplished by the beneficiary-corporation with the same malefactors, outside the framework of the derivative action and without consultation with the plaintiff.

Does Curtis suggest that the general releases may be impeached in this action? Does it also suggest that the large consideration which it has paid and agreed to pay to Culligan, Kantor and Blair may be the subject of a restitution decree in this action? If so, why effect the settlements outside the framework of this action? Since Curtis has concluded by its denials that it has no case against Culligan, Kantor and Blair upon the claims pleaded in this action, then it should have so urged before the courts below in support of its settlement with Culligan, Kantor and Blair. The plaintiff and the other stockholders would be afforded an opportunity, before the settlements had been consummated, to prove to the contrary. The settlements effected by Curtis with Culligan, Kantor and Blair can have meaning to these parties only if they were intended to be a bar to the prosecution by this plaintiff or by any other stockholder of any Curtis claims against Culligan, Kantor and Blair. Otherwise, Curtis could have sought to require Culligan, Kantor and Blair to plead their claims in this action, or moved to stay them from prosecuting their claims elsewhere until the disposition of the claims asserted against them here.

If the true intent of Rule 23(c) were to limit its applications to settlements only by the plaintiff in a derivative action, then the defendants, without the participation of the plaintiff, the other stockholders or the court, by their uni-

lateral acts, could, by settling non-pleaded cross-claims, extinguish the claims asserted in the complaint. This was the kind of conduct which was criticized by the late Chief Judge Clark in his opinion in *Certain-Teed Products Corporation* v. *Topping,* 171 F. (2d) 241 (2 Cir. 1948). The very point of the case was that *Topping,* the plaintiff in the Rhode Island derivative action, was faced with a *fait accompli* (a general release executed by the corporation to Brown, the defaulting officer). It is the sense of the court's opinion in *Topping,* as we read it, that where there is an unresolved derivative action pending, no action to settle the claims which may be involved therein may be taken by any of the parties without notice to stockholders and the approval of the court.

The precautions which the petitioner has taken by including a new third cause of action in her amended and supplemental complaint dealing with this conduct by Curtis (which amendment was made after the decision by the Court of Appeals below) should not preclude this Court from considering the important question which was raised by petitioner's motion in the District Court. If petitioner's view of the applicability of Rule 23(c) is sound, then the inclusion of the claim in the amended and supplemental complaint is irrelevant.

4. Traditional considerations for granting certiorari are present in this case.

The respondent is in error in suggesting that no compelling reason exists for this Court to review the decision of the Court of Appeals. Respondent's arguments 1 and 2 under this point are irrelevant because this is a case of first impression. It has never been directly ruled on by any other court.

We have already shown the importance of the question in our petition and in this brief, not only to this petitioner but generally, as a guide to the courts in their application of Rule 23(c) under like situations in the future.

CONCLUSION

For all of the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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